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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

PAUL E. NELMS,
Petitioner,

vs.

STATE OF TENNESSEE,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF TENNESSEE

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QUESTIONS PRESENTED FOR REVIEW

1. Did the petitioner have the right to testify in his own defense and while so testifying to invoke the Fifth Amendment as to other criminal charges for which he was under indictment and which occurred fourteen (14) months after the alleged crime for which the petitioner was on trial?

2. Did the petitioner have the right to have the Court grant immunity to the defense witness, Hal Vest, who was one of two eyewitnesses and whose testimony would have exonerated the petitioner when the State of Tennessee, which has no authority to grant any witness immunity, granted an accomplice immunity to testify against the petitioner?

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OPINIONS BELOW

The majority opinion and the dissenting opinion of the Tennessee Court of Criminal Appeals which is an unreported decision is printed as Appendix A. The denial of the Application for Permission to Appeal by the Tennessee Supreme Court concurring in results only which is an unreported decision is printed as Appendix B.

JURISDICTION

The Supreme Court of Tennessee denied petitioner's Application for Permission to Appeal concurring in results only on June 4, 1984. Justice O'Connor on July 31, 1984, extended the time for filing a Petition for Writ of Certiorari to and including September 2, 1984. A copy of the Order extending time to file

Petition for Writ of Certiorari is printed as Appendix C. Jurisdiction is invoked pursuant to 28 U.S.C. §1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

Amendment 5

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment by a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice be put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself; nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment 6

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

Amendment 14, Section 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

On March 17, 1982, the grand jury of Henry County, Tennessee, indicted the petitioner of five (5) counts involving an assault upon Jack Weaver on January 22, 1981, to-wit:

Count I - Assault with intent to commit murder in the first degree;

Count II - Armed robbery;

Count III - Accessory before the fact of assault with intent to commit murder in the first degree;

Count IV - Making a threat for the purpose of obtaining action; and

Count V - Conspiracy.

On May 3, 1982, the grand jury of Hardeman County, Tennessee, indicted the petitioner for conspiracy and solicitation to commit the murder of Jack Weaver.

The Henry County indictment alleged the petitioner's involvement in a January 22, 1981, assault of Jack Weaver. The Hardeman County indictment alleged the petitioner's involvement in a March, 1982, crime against Jack Weaver. The January, 1981, crime and the March, 1982, alleged crime occurred approximately fourteen (14) months apart.

The petitioner was tried by a jury in Henry County on July 19 - 20, 1982, upon his plea of not guilty. Upon the conclusion of the presentation of evidence by the State the trial judge dismissed Counts I and II of the indictment. The petitioner was convicted of Count IV and lesser included offenses of Counts III and V as follows:

Count III - Accessory before the fact of aggravated assault and punishment fixed at not less than three (3) nor more than ten (10) years in State penitentiary;

Count IV - Making a threat for the purpose of obtaining action and punishment fixed at not less than two (2) nor more than five (5) years in State penitentiary; and

Count V - Conspiracy to commit an indictable offense and punishment fixed at eleven (11) months and twenty-nine (29) days in the Henry County jail and a fine of $1,000.00.

The petitioner was acquitted of the Hardeman County charge on April 19, 1983. The petitioner's acquittal in Hardeman County followed his conviction in Henry County by approximately nine (9) months.

The Henry County charges against the petitioner involved an assault upon Jack Weaver on January 22, 1981.

During the late afternoon of January 22, 1981, Jack Weaver was returning from work to his home in Paris, Tennessee, when he was approached by a man in Jack Weaver's driveway. This man was later identified as Harvey Faglier. As Harvey Faglier approached Jack Weaver several questions were asked and answered and then Harvey Faglier assaulted Jack Weaver striking him with several blows which resulted in a laceration to the head of Jack Weaver and a broken arm. During the assault upon Jack Weaver by Harvey Faglier the only words attributed to Harvey Faglier by Jack Weaver was the statement "I am going to kill you".

Harvey Faglier escaped from the scene in an automobile driven by Hal Vest.

Prior to the assault upon Jack Weaver the petitioner and Jack Weaver had entered the banking business as substantial partners in 1977 in Henry County, Tennessee. Jack Weaver and the petitioner purchased substantial shares of the Cottage Grove Bank and Trust Company which later became Security Bank and Trust Company. Both men served as officers of this Bank until October, 1980, at which time Jack Weaver brought certain charges against the petitioner resulting in the petitioner's

suspension from the Board of Directors and as President of the Bank.

The trials of Harvey Faglier and Hal Vest were delayed for a considerable period of time and shortly before Harvey Faglier was scheduled for trial in April of 1982, Gene Faglier, the uncle of Harvey Faglier, informed law enforcement officials that the petitioner had solicited him to have someone kill Jack Weaver.

Gene Faglier was granted immunity in both Henry County and Hardeman County, Tennessee. After being granted immunity by the State of Tennessee, Gene Faglier stated that the petitioner had procured him to deliver a message to Jack Weaver during January of 1981 which ended in the altercation between Harvey Faglier and Jack Weaver.

During the course of the petitioner's trial in Henry County the attorneys for petitioner moved the Court that the petitioner be allowed to testify in his own defense as to all matters relating to the crime for which he was on trial which occurred during January of 1981 but that the petitioner be allowed to invoke his Fifth Amendment rights as to other alleged incidents which occurred subsequent to January of 1981 and specifically the alleged crime which allegedly occurred in March of 1982 and for which the petitioner was presently under indictment in Hardeman County, Tennessee.

The Court denied the petitioner's motion and specifically stated that if the petitioner took the witness stand in his own defense that the petitioner would be required to testify as to both the January 1981, incident and the March 1982, incident. The Court specifically held that the petitioner would have to answer all questions of the prosecution and that the petitioner would not be allowed to invoke his Fifth Amendment rights as to any questions once he took the witness stand.

The petitioner stated to the Court through his attorneys that he desired to take the witness stand and deny any involvement in

the January 1981 incident but that he would have to take his Fifth Amendment rights as to the March 1982 incident since he was presently under indictment in Hardeman County. When the trial court ruled that the petitioner could not invoke his Fifth Amendment rights to any questions, the defendant chose not to take the witness stand.

During the course of the petitioner's trial the petitioner's attorneys moved the Court to grant Hal Vest, one of two people present when Jack Weaver was assaulted in January 1981 immunity so that Hal Vest would be allowed to testify for the petitioner. The trial court denied the petitioner's motion to grant Hal Vest immunity.

The State of Tennessee has no authority to grant any witness immunity. The State of Tennessee without authority granted Gene Faglier, the uncle of Harvey Faglier, immunity to testify against the petitioner.

The petitioner raised his Fifth Amendment rights in the trial court. The petitioner further raised the denial of his Fifth Amendment rights in the Court of Criminal Appeals of Tennessee.

The petitioner did not specifically allege a violation of the Fourteenth Amendment in the trial court but the petitioner did raise the Sixth Amendment and Fourteenth Amendment violations in denying him the benefit of the testimony of Hal Vest in the Court of Appeals of Tennessee. Tennessee permits the raising of constitutional questions in a criminal matter at the appellate stage of the proceedings.

The Tennessee Court of Criminal Appeals in a two to one decision affirmed the conviction of petitioner on January 26, 1984.

A timely Application For Permission To Appeal to the Tennessee Supreme Court was filed on March 26, 1984, which raised all of the issues addressed herein. The Application For Per-

mission To Appeal was denied concurring in results only on June 4, 1984.

REASONS FOR GRANTING THE WRIT

1. **Did the petitioner have the right to testify in his own defense and while so testifying to invoke the Fifth Amendment as to other criminal charges for which he was under indictment and which occurred fourteen (14) months after the alleged crime for which the petitioner was on trial?**

The issue presented is the application of the Fifth Amendment to the petitioner. The petitioner desired to testify and deny his guilt in the January 1981 Henry County incident. At the time of the petitioner's Henry County trial he was under indictment in Hardeman County for an alleged offense which occurred in March of 1982. The trial court ruled that the petitioner would not be entitled to invoke his Fifth Amendment rights to questions asked by the prosecution respecting the March 1982 incident if the petitioner took the witness stand in his own defense.

The petitioner was specifically informed by the Court that if the petitioner took the witness stand that the petitioner could not take the Fifth Amendment to any questions asked by the prosecution whether or not the prosecution's questions related to the offense for which he was on trial or whether the prosecution's questions related to the other criminal offense for which the defendant was indicted but was not then on trial.

The Federal Rules of Evidence limit cross examination to matters brought out on direct examination. Tennessee differs from the Federal Rules of Evidence in that Tennessee allows unlimited cross examination.

The transcript of the petitioner's Henry County trial where the petitioner alleges that his Fifth Amendment rights were violated states as follows:

Mr. Cary: ... Mr. Nelms would like to take the stand and deny his guilt in this crime, however, Mr. Nelms, as your Honor knows, is indicted in Hardeman County Circuit Court for the offense of Solicitation of First Degree Murder, primarily what these tapes have been referring to. We would like to call Mr. Nelms to the stand to testify. We would like for any cross examination or any evidence from Mr. Nelms to be limited to January 22, 1981, or anything that happened precedent thereto - the facts for which he is on trial here, so that Mr. Nelms will not have to invoke the Fifth Amendment as to anything that happened after January 22, 1981, specifically the incident in March, 1982, as regards these tapes.

Mr. Peeples: If your Honor please, to deny us to cross examine him is to deny us the right to prosecute this case.

Mr. Cary: We will answer any questions the State wants to ask as to January, 1981. That's what he's on trial for. I think it's getting confused whether he's on trial in Hardeman County or up here now.

Mr. Peeples: Your Honor, these tapes have been presented in evidence. Your Honor ruled that they were admissible for several reasons, which we've gone over, and we have a right to question him, we feel, if he takes the Stand, concerning the matters of intent, as to why he did what he is alleged to have done on those tapes, or what his motive was or what the connection between the subsequent events against Mr. Weaver was with the prior offense. To grant that motion is to deny us the right to cross examination.

Mr. Cary: There's no way in the world that the motive or intent for crime in 1981 can be formed or proved by something that happened in 1982.

Mr. Peeples: No, sir, but it certainly could be proven by something that happened in 1982, or certainly shown by something that happened in 1982.

The Court: I ruled the tapes admissible. I think it would be proper cross examination. I'll overrule the motion. (T. p. 205-207)

Mr. Cary: One other motion. If Mr. Nelms takes the stand, your Honor has previously ruled that the State can ask him about occurrances subsequent to January, 1981. If Mr. Nelms is asked those questions subsequent to January, 1981, we would instruct Mr. Nelms to take the Fifth Amendment.

We would like for your Honor to rule as to whether or not the Court will allow Mr. Nelms to interpose the Fifth Amendment - he will answer anything about the January, 1981, incident, but we cannot allow him to testify about the January, 1982 incident.

The Court: I would require him to answer all questions that would be relevant to cross examination, which would include questions concerning the tapes. (T. p. 212)

The tapes referred to in the above Transcript involved only the March, 1982, crime. There is no mention of the January 1981 Henry County incident at any place in the tape recordings.

A person accused of a criminal offense who takes the stand in his own behalf waives his constitutional privilege of silence, as discussed infra § 456, and he may be cross-examined by the prosecution in the same manner as any other witness, and compelled to do what would be material and competent of any other witness. *However, he enjoys the same immunities with respect to compulsory self-incrimination as other witnesses, except as to the offense with which he is charged, and in general he cannot be compelled to incriminate himself as to an offense other than that for which he is on trial, or be asked questions irrelevant to the issue having a tendency to bring in other*

> *charges. He may be cross-examined concerning his commission of other like offenses shortly before and after the crime charged, where such evidence is relevant on the question of his intent, or is so close in duration of time that it is a part of the res gestae of the offense charged;* ... (Emphasis Petitioner's) 98 C.J.S., Witnesses § 442, p. 270-272

> Where, however, a question relates to incriminating acts, or calls for evidence of an incriminating character, separate and distinct from those on trial or testified to by him, he may claim the privilege and decline to answer it. 98 C.J.S., Witnesses § 442, p. 274

The pertinent provision of the Fifth Amendment to the Constitution of the United States is as follows:

> No person ... shall be compelled in any criminal case to be a witness against himself; ... .

There is no doubt that if the petitioner had taken the stand in Henry County and had been forced to testify concerning the events for which he was currently under indictment in Hardeman County, Tennessee, that the State of Tennessee would have used his testimony against him in the Hardeman County trial. The petitioner was precluded from taking the stand because he would have been subjected to cross examination concerning an alleged criminal offense which occurred fourteen (14) months after the crime for which he was presently on trial and which testimony would have been used against him by the State of Tennessee in his subsequent trial.

> But the power to compel testimony is not absolute. There are a number of exemptions from the testimonial duty, the most important of which is the Fifth Amendment privilege against compulsory self-incrimination. The privilege reflects a complex of our fundamental values and aspirations, and marks an important advance in the development of our liberty. It can be asserted in any proceeding, civil or

criminal, administrative or judicial, investigatory or adjudicatory; and it protects against any disclosures which the witness reasonably believes could be used in a criminal prosecution or could lead to other evidence that might be so used. This Court has been zealous to safeguard the values which underlie the privilege. *Kastigar v. United States,* 92 S. Ct. 1653, 1656 (1972)

2. **Did the petitioner have the right to have the Court grant immunity to the defense witness, Hal Vest, who was one of two eyewitnesses and whose testimony would have exonerated the petitioner when the State of Tennessee, which has no authority to grant any witness immunity, granted an accomplice immunity to testify against the petitioner?**

There is no authority for the State of Tennessee to grant anyone immunity from prosecution. The State of Tennessee granted the accomplice, Gene Faglier, immunity from prosecution for the specific purpose of securing his testimony against the petitioner in an attempt to secure the conviction of the petitioner.

The petitioner desired to call as his witness Hal Vest who was present at the time Harvey Faglier (nephew of the accomplice Gene Faglier) assaulted Jack Weaver. The petitioner's position was the Hal Vest possessed exculpatory information which would serve to exonerate the petitioner. The petitioner moved the Court to grant the petitioner's witness Hal Vest, immunity under the Court's inherent authority to grant immunity so that Hal Vest could testify. In the petitioner's view the testimony of Hal Vest would have acquitted an innocent defendant. The trial court refused to grant Hal Vest immunity.

There were Three (3) persons present when Jack Weaver was assaulted by Harvey Faglier: Jack Weaver, Harvey Faglier and Hal Vest. Hal Vest steadfastly refused to implicate the petitioner.

The State of Tennessee has an obligation to insure not only that the guilty are convicted but that the innocent are set free. The State of Tennessee with no authority to do so granted immunity to an accomplice to convict the petitioner while denying immunity to an accomplice who would acquit the petitioner.

The petitioner submits that under the facts of this case that it was a manifest injustice and denial of the petitioner's right to due process and equal protection to deny Hal Vest use immunity simply because he would have exonerated the petitioner. The State of Tennessee is charged with providing the petitioner with all exculpatory evidence pursuant to *Brady v. Maryland,* 373 U.S. 83 and insuring the right of the defendant to a fair and impartial trial.

The Fifth Amendment to the Constitution of the United States provides in part as follows:

> No person shall ... be deprived of life, liberty, or property, without due process of law; ...

The Sixth Amendment to the Constitution of the United States provides in part as follows:

> In all criminal prosecutions, the accused shall ... have compulsory process for obtaining witnesses in his favor, ...

The Fourteenth Amendment to the Constitution of the United States provides in part as follows:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor to deny to any person within its jurisdiction the equal protection of the laws.

The immunity requested by the petitioner was use immunity and not transactional immunity. Hal Vest could have testified so long as his testimony was not later used againt him. Other evidence was sufficient to convict him.

... The courts have invariably held that they lack power to grant immunity except on request of the Government. ...

The rationale for this unavailability of immunity to a witness at the defendant's request has been characterized thus: "A person suspected of crime should not be empowered to give his confederates an immunity bath." In re *Kilgo,* 484 F.2d 1215, 1222 (4th Cir. 1973). However, 18 U.S.C. § 6002 does not provide an "immunity bath" for witnesses but merely provides "use immunity," so that no testimony compelled by the grant of immunity, nor any information directly or indirectly derived from such testimony, may be used against the witness in a subsequent prosecution other than for perjury. ...

There are circumstances under which it appears due process may demand that the Government request use immunity for a defendant's witness. ... *United States v. Morrison* 535 F2d 223, 229 (3rd Cir. 1976)

Immunity statutes are ordinarily for the benefit of the prosecution, and accused cannot invoke the statute to compel a witness to testify. 98 C.J.S. Witnesses, § 439, p. 262.

Even if a Court is powerless to compel, the government to immunize a defense witness, there are circumstances where considerations of fairness, and thus of due process, mandate that the government request use immunity for an accused's witness or be barred from prosecuting the accused. 98 C.J.S. Witnesses, § 439, Supp. Note 87.15

Then Circuit Judge Burger in *Earl v. United States* 361 F2d 531 (US App. D.C. 1966) stated at p. 544:

... What Appellant asks this Court to do is command the Executive Branch of government to exercise the statutory power of the Executive to grant immunity in order to

> secure relevant testimony. This power is not inherent in the Executive and surely is not inherent in the judiciary. ... The Government does not suggest that Congress could not provide for a procedure giving a defendant a comparable right to compel testimony, but only that congress has not done so. ... We conclude that the judicial creation of a procedure comparable to that enacted by Congress for the benefit of the Government is beyond our power.[1]
>
> 1. We might have quite different, and more difficult, problems had the Government in this case secured testimony from one eyewitness by granting him immunity while declining to seek an immunity grant for Scott to free him from possible incrimination to testify for Earl. That situation would vividly dramatize an argument on behalf of Earl that the statute as applied denied him due process. Arguments could be advanced that in the particular case the Government could not use the immunity statute for its advantage unless Congress made the same mechanisim available to the accused. Here we are asked in effect to rewrite a statute so as to make available to the accused a procedure which Congress granted only to the Government.

Tennessee does not have an immunity statute like the Federal System. The Attorney General in the Federal System is part of the Executive Branch of government while in Tennessee he is part of the Judicial Branch.

The issue of granting immunity to defense witnesses is the subject of an article by Associate Professor Lawrence Taylor in an article entitled "Obtaining Immunity For Defense Witnesses" in *The Practical Lawyer,* Volume 29, No. 6, page 75 (September 1, 1983). The petitioner in his July 1982 trial followed very closely the procedures suggested by Professor Taylor in his article at page 82.

The petitioner desired to call as his witness Hal Vest who was present at the time Harvey Faglier (nephew of the accomplice Gene Faglier) assaulted Jack Weaver. Hal Vest was instructed to interpose his Fifth Amendment rights by his attorney, the Honorable Bill Vest (the defense attorney Bill Vest is not related to Hal Vest). (T. p. 202-203)

The trial court ruled that Hal Vest would be allowed to invoke his Fifth Amendment rights. (T. p. 204)

The petitioner attempted to make an offer of proof as to the testimony of Hal Vest but the offer of proof was opposed by the District Attorney General. The questions which were to be asked to Mr. Vest were read (T. p. 210) and the Court ruled that only questions 1, 2, 3, and 7 could be asked. Question 1 was Hal Vest's name. Question 2 was his age. Question 3 was his address. Question 7 was whether or not he was currently charged in Henry County Circuit Court with the assault of Jack Weaver. The Court ruled all other questions would be subject to the Fifth Amendment rights of the accomplice Hal Vest. (T. p. 211-212).

Although the answers to the questions were not allowed to be read in the petitioner's offer of proof (T. p. 210) they are found in the record at page 74. A copy of the questions and answers is printed as Appendix D. The answers (R. p. 74) were ascertained from Hal Vest, Sr.'s attorney, William Vest, and the attorneys for the petitioner were informed by the Assistant District Attorney General that these answers were his understanding of the testimony of Hal W. Vest if he were allowed to testify.

Several cases of the United States Court Of Appeals For The Third Circuit have established the right of a defendant to have an appropriate witness immunized. *U.S. v. Morrison*, 535 F.2d 223 (3rd Cir. 1976), *Herman v. U. S.*, 589 F.2d 1191 (3rd Cir. 1978), *Government Of The Virgin Islands v. Smith*, 615 F.2d 964 (3rd Cir. 1980).

As was stated by the United States Court Of Appeals For The Third Circuit in the case of *Government Of The Virgin Islands v. Smith*, 615 F.2d 964 (3d Cir. 1980):

> ... when it is found that a potential defense witness can offer testimony which is clearly exculpatory and essential to the defense case and when the government has no strong interest in withholding use immunity, the court should grant judicial immunity to the witness in order to vindicate the defendant's constitutional right to a fair trial.

The issue as to whether or not the petitioner's witness Hal Vest should have been granted immunity is compounded by the fact that the State of Tennessee has no authority to grant any witness immunity but yet without authority the State of Tennessee granted the accomplice Gene Faglier immunity to testify against the petitioner.

CONCLUSION

For the foregoing reasons, a Writ of Certiorari should be issued to review the judgment and opinion of the Court of Criminal Appeals of Tennessee. Petitioner requests that the Court grant review on the merits and reverse the decision of the Tennessee Court of Criminal Appeals.

Respectfully submitted,

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APPENDIX

APPENDIX A

IN THE COURT OF CRIMINAL APPEALS
OF TENNESSEE AT JACKSON

April Session, 1983

No. 4

Henry County

Honorable Dick Jerman, Jr., Judge

State of Tennessee,
Appellee,

v.

Paul Nelms,
Appellant.

(Accessory before the fact to aggravated assault, making a threat to compel a person to do acts against his will, and conspiracy to commit an indictable offense)

Filed Jan. 26, 1984

Jewel Redden, Clerk

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AFFIRMED

OPINION FILED: Jan. 26, 1984

JERRY SCOTT, JUDGE

OPINION

The appellant was convicted of accessory before the fact of aggravated assault and received a sentence of not less than three nor more than ten years in the state penitentiary. He was also found guilty of making a threat for the purpose of compelling another to do acts against his will and received a sentence of not less than two nor more than five years in the state penitentiary. Finally, he was convicted of conspiracy to commit an indictable offense and was sentenced to eleven months and twenty-nine days in the county jail, plus a $1,000.00 fine. The record is silent as to how the sentences will run; therefore, they will run concurrently. Rule 32(a), T.R.Cr.P.

Much aggrieved by this conviction, the appellant has perfected his appeal. A short recitation of the facts will place the issues in context.

The victim, Thomas J. Weaver, Jr., was the Chairman of the Board and President of the Security Bank & Trust Company of

Paris, Tennessee. In 1977, Mr. Weaver and the appellant entered the banking business together at the Cottage Grove Bank & Trust Company, Cottage Grove, Tennessee. The appellant was the president of that bank.

In September 1980, employees of the Cottage Grove Bank & Trust Company reported certain irregularities to Mr. Weaver. These included the alteration of certificates of deposit and the alteration of the interest rate of certain promissory notes. After instructing the employees to take no further part in such activities, Mr. Weaver discussed these matters with the appellant and told him that such actions were violations of the banking laws. The appellant told Mr. Weaver to mind his own business. Mr. Weaver told the appellant that if anything like that happened again he would report it. The very next day it was brought to his attention that another instrument had been voided and reissued. Mr. Weaver informally reported these irregularities to members of the bank's board of directors, the counsel for the Federal Deposit Insurance Corporation, representatives of the Tennessee Department of Banking and the United States Attorney.

On October 22, 1980, Mr. Weaver formally reported the matter to a meeting of the Board of Directors of the bank, and the appellant was suspended from employment as the bank's president. A further report was made to the bank directors in December 1980, and to the shareholders on January 8, 1981. The appellant was present at all of these meetings and took issue with Mr. Weaver's report. He became antagonistic and told the people present that he was innocent until proven guilty.

On January 22, 1981, shortly after 5:00 P.M., Mr. Weaver arrived at his home. He got out of his car and started toward the door. He was carrying a pistol in his left hand and had his raincoat over his left arm. Mr. Weaver was confronted by a man, later identified as Harvey (Duke) Faglier. Mr. Faglier asked Mr. Weaver about ownership of the property next door, to

which Mr. Weaver replied that he would have to speak to Mrs. Weaver about that. Mr. Weaver noticed an object that appeared to be a club behind Mr. Faglier's leg. Mr. Weaver turned and started to walk into his house. He was immediately hit in the back of the head and knocked to the ground. A second blow was struck across his arm after he was on the ground. Mr. Weaver switched his gun to his right hand and a further struggle ensued. Mr. Faglier told Mr. Weaver that he was going to kill him and he then hit him in the hand with some object. Mr. Faglier grabbed Mr. Weaver's gun and fled in an automobile driven by a man later identified as Hal W. Vest, Sr., a Deputy Sheriff from Davidson County.

Mr. Weaver received a severe laceration about six inches long to the back of the head, so severe that a portion of his scalp was torn loose. He received a broken arm and a hematoma on his hand. In addition, there were other contusions and abrasions to his body.

Law enforcement officers were immediately notified, and Messrs. Vest and Faglier were arrested in Camden, Tennessee, in the same automobile with a small arsenal of weapons and ammunition therein.

Harvey Faglier's uncle, Gene Faglier, testified for the prosecution. In late December or early January, he was contacted by the appellant, who wanted him to deliver a message to Mr. Weaver. The message that he wanted delivered was to tell Mr. Weaver to "tend his own God damn business and quit fucking around with his — clean up his own back yard". For the delivery of this message, the appellant was willing to pay $3,000.00.

At about 6:30 P.M. on January 15, the appellant met Gene Faglier at King's Auto Parts in Bolivar, Tennessee. He gave Mr. Faglier a roll of money alleged to contain $3,000.00. Later that night, Gene Faglier delivered the money to Harvey Faglier and told him to deliver the message. According to Gene Faglier, the appellant told him that he did not want the victim hurt.

In January 1982, the appellant began talking to Gene Faglier about the possiblity of having Mr. Weaver killed. At that time Gene Faglier contacted law enforcement officers, since he could not be a party to murder. He was wired for sound by the Tennessee Bureau of Investigation and talked with the appellant in February about the proposed murder. He was supposed to meet the appellant again on March 3 at the Hardeman Garment Company parking lot. The appellant drove through the lot but did not stop. The next day they met again at King's Auto Parts. The price for the murder was $6,000.00. The appellant offered $5,000.00, but that was initially refused. The appellant offered a $1,000.00 down payment, with the balance payable when the job was completed, but Gene Faglier told him that his man wouldn't go for that. Later, the appellant's partner, Johnny Johnson, brought a package to Gene Faglier, who told him that he would have to get the money from the appellant personally. Later on that afternoon, Gene Faglier went to Mr. Johnson and got the package containing $1,000.00.

On March 15, 1982, Gene Faglier contacted the appellant by phone at a motel in Hot Springs, Arkansas. Gene Faglier told the appellant falsely that the job had been done and that he wanted the balance of the money, which was to include the $5,000.00 balance payable to the killer and a $500.00 "finder's fee" for Mr. Faglier. The appellant told him to call Mr. Johnson. Later that afternoon Mr. Faglier did so and received a package containing $5,500.00.

In this case the appellant was on trial only for the activities surrounding the solicitation of the beating of Mr. Weaver which took place in Henry County. The other activities took place elsewhere and were the subjects of other prosecutions.

In his first issue the appellant contends that the indictment should have been dismissed because the District Attorney General violated TCA §8-7-501.

This matter was raised on the morning of trial by an oral motion. The defense counsel alleged that two members of the

grand jury had told him about certain improprieties about the District Attorney General's appearance before that body. No proof was presented, and the trial judge overruled the motion.

TCA §8-7-501 provides that when required by the grand jury, the District Attorney General or a designated assistant may attend the proceedings of the grand jury "for the purpose of assisting in its inquiry, which assistance may include the examination of witnesses and the giving of legal advice as to any matters cognizable by that body". However, the District Attorney General or his assistant is prohibited by the statute from being present when the vote is taken upon the finding of an indictment.

The impropriety alleged by the appellant included violations of *Tiller v. State,* 600 SW2d 709 (Tenn. 1980). In *Tiller,* our Supreme Court held that prosecuting attorneys have no authority to appear before the grand jury for any purpose other than the giving of legal advice. The court held that the action of the prosecutor in *Tiller* in appearing before the grand jury to examine witnesses was improper and unauthorized whether or not requested by the grand jury. 600 SW2d at 712. However, the Court went on to hold that there was no showing of any prejudice to Tiller by the improper actions of the prosecuting attorney and held, in view of the overwhelming evidence against the defendant, that this error and others alleged were necessarily harmless. 600 SW2d at 713-14.

It was in response to *Tiller* that TCA §8-7-501 was passed by the General Assembly, and became effective on May 30, 1981. Public Acts of 1981, Chapter 419 §1. There simply is nothing in the record to show that the District Attorney General violated this section of our code by being present during the vote upon whether the appellant should be indicted. His presence at other times would not be in violation of TCA §8-7-501.

Furthermore, it is not permissible to go behind an indictment. An indictment returned by a grand jury, if valid on its face, is

enough to call for trial of the charge on the merits. The legality of evidence heard by a grand jury is simply not subject to judicial review. *State v. Gonzales,* 638 SW2d 841, 845 (Tenn.Cr.App. 1982).

In his next issue the appellant contends that the trial judge erred by failing to comply with TCA §8-7-503 in explaining their duties to the members of the grand jury and by not reducing his charge to the grand jury to writing and having a verbatim transcript of his charge prepared.

TCA §8-7-503 provides that it is the duty of the trial judge who instructs the grand jury to charge them as to the provisions concerning the proper role of the District Attorney General as set out in TCA §8-7-501, so that they will be fully informed of the fact that the District Attorney General may attend before the grand jury only upon the request of that body. In response to this motion the trial judge noted that he had fully and correctly charged the grand jury, and there is nothing in the record to dispute the trial judge's statement.

The appellant also relies upon TCA §40-14-307(a), which requires the attendance of a designated reporter at "every stage of each criminal case" and the verbatim recording of all proceedings had in open court and such other proceedings as the judge may direct. However, the charge of the trial judge to the grand jury is not a "stage of (a) criminal case".

The grand jury is an inquisitorial body which has powers to inquire into, consider and act upon criminal cases submitted by the District Attorney General and those brought to its attention by its own members. Rule 6(d) and (e)(1) and (2), T.R.Cr.P. In addition, the grand jury has numerous other duties. Rule 6(e), (3), (4), (5), (6) and (7), T.R.Cr.P. The trial judge is required to "instruct it concerning its powers and duties and expounded the law to it as he shall deem proper". Rule 6(a)(5), T.R.Cr.P.

It is obvious that the instructions to the grand jury concerning its powers and duties given by the trial judge on the first day of

the term of court is not a part of any particular criminal case which may be brought before that body during its tenure. There is no requirement that a verbatim transcript of the judge's charge be prepared. This issue has no merit.

In the next issue the appellant contends that his right to a fair trial was prejudiced by the acts of the District Attorney General in refusing to allow him to examine the tape recordings after stating to the court that he would do so.

Ultimately, the appellant obtained the tape recordings under Rule 16(a)(1)(C), T.R.Cr.P., and this issue has no merit.

In the next issue the appellant contends that his right to a fair trial was prejudiced by the actions of the District Attorney General in subpoening the appellant's private investigator and attempting to secure his attorney's work product.

A subpoena was issued for the private investigator employed by the appellant. The trial judge sustained the strenuous objections of defense counsel based upon the confidentiality of their work product. He was never called as a witness or required to testify. This issue has no merit.

Next, the appellant contends that the trial judge erred by admitting the March 1982 tape recordings as they were irrelevant to the offenses on trial which had occurred in January 1981. He further contends that any probative value of the tape recordings were substantially outweighed by their prejudicial effect and further contends that the tape recordings were not properly authenticated.

Evidence of another, wholly independent crime is generally inadmissible to prove the commission of the crime charged.

This is true *because it is irrelevant. Bunch v. State,* 605 SW2d 227, 229 (Tenn. 1980) (emphasis in original). However, if evidence that the defendant has committed a crime separate and distinct from the one on trial *is relevant* to some matter actually

in issue in the case on trial and if its probative value as evidence of such matter in issue is not outweighed by its prejudicial effect upon the defendant, then such evidence may be properly admitted. *Id.* (emphasis in original).

Relevant evidence is defined as evidence which has the tendency to establish a material proposition. The suggested "test" for whether evidence is relevant is "does the evidence offered make the material proposition either more probable or less probable than it would be without the evidence?" If the common sense answer is affirmative, the evidence is relevant. If it is negative, it is irrelevant. Paine, *Tennessee Law of Evidence,* §1, pp. 1, 2. Rule 401, Fed.R.Ev., adopted in Tennessee in *State v. Banks,* 564 SW2d 947, 949 (Tenn. 1978), defines relevant evidence as that which has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence".

Evidence of other crimes is admissible to show (1) motive, (2) intent, (3) guilty knowledge, (4) identity of the defendant, (5) absence of mistake or accident, or (6) a common scheme or plan for the commission of two or more crimes so related to each other that proof of one tends to establish the other. *Collard v. State,* 526 SW2d 112, 114 (Tenn. 1975).

Applying these principles, it is obvious that the evidence in this case was relevant and admissable. The animosity that existed between the appellant and the victim because the victim reported the appellant's illegal banking activities is obvious. This evidence showed the appellant's intent to "get even" with the victim and his motive of trying to silence the victim, first by intimidation, and later by having the victim killed. The evidence revealed that the assault was part of a larger plan scheme or conspiracy directed against the victim. *Bunch v. State,* 605 SW2d 227, 229 (Tenn. 1980).

However, the most salient reason for the admission of this evidence is upon the issue of identity. No objection can be raised to the admission of proof of independent crimes when such proof is necessary to establish identity. This is true whether the proof of the independent crime is incidental to the establishment of identity or is the basis thereof. *Harris v. State,* 189 Tenn. 635, 227 SW2d 8, 10 (1950). Generally speaking, it is only when the identity of the accused is not definitely connected with the offense on trial that proof of other offenses may be introduced to connect and identify him with the case on trial. *Jones v. State,* 523 SW2d 942, 944 (Tenn.Cr.App. 1975), citing Am.Jur.2d Evidence, §322.

In this case, the appellant admitted that the victim was severely beaten, but he denied any connection with the crime. Although there was direct proof that the appellant wanted a "message" delivered to the victim, it was indicated that he did not want the victim hurt. The evidence of the subsequent criminal activity directed against the victim clearly refuted any notion that the appellant did not want to have the victim beaten.

The probative value of this evidence outweighed its prejudicial effect upon the appellant. The evidence of the subsequent effort to have the victim killed was admissible.

In *Marable v. State,* 203 Tenn. 440, 313 SW2d 451, 459 (1958), our Supreme Court noted the following principle from 22 CJS (Criminal Law) §623, p. 955:

> Any ex post facto indication by accused of a desire to evade prosecution may be shown as one of series of circumstances from which guilt may be inferred.

Relying upon this principle, this Court held in *Shockley v. State,* 585 SW2d 645, 649 (Tenn.Cr.App. 1978), that evidence of an alleged attempt to suppress or destroy evidence by setting fire to the victim's house and the fact that the victim was pregnant were properly admitted at the defendant's trial for the rape of a thirteen year old girl.

The efforts of the appellant to have the victim killed revealed an ex post facto desire by the appellant to avoid prosecution for the offenses now before this Court and other offenses with which he was charged under the banking laws.

Furthermore, the trial judge carefully and completely charged the jury as to the limited purposes for which the evidence of the appellant's subsequent crimes could be considered. We must assume that the jury followed the judge's charge. *State v. Barton,* 626 SW2d 296, 298 (Tenn.Cr.App. 1981). Evidence of the subsequent offer to have the victim killed was properly admitted as an indication of guilt.

Finally, as to the authentication of the tapes, the appellant's voice thereon was identified at trial by both Gene Faglier and Jack Blackwell, an agent of the Tennessee Bureau of Investigation. Mr. Blackwell was present at the time the telephone call was made from Mr. Faglier to the appellant regarding the alleged completion of the murder and he assisted in the taping of the conversation. Mr. Blackwell had known the appellant for fifteen years. Their testimony established the proper foundation for the admission of the tape recordings. *Stroup v. State,* 552 SW2d 418, 420 (Tenn.Cr.App. 1977). This issue has no merit.

In the next issue the appellant contends that the accomplice's testimony was not corroborated and thus there is no evidence independent of that testimony to implicate the appellant.

The trial judge ruled that Gene Faglier was an accomplice and so charged the jury. When the facts of a witness' participation in the crime are clear and undisputed, whether that person is an accomplice then becomes a question of law for the court. *Ripley v. State,* 189 Tenn. 681, 227 SW2d 26, 29 (1950). In Tennessee, unlike the common law and some other jurisdictions, an accomplice's testimony must be corroborated by some fact which, testified to entirely independent of the accomplice's testimony, taken by itself, leads to the inference, not only that a crime has been committed, but that the defendant is implicated in it. This

corrobative evidence must include some fact or circumstance that affects the defendant's identity. *State v. Fowler,* 213 Tenn. 239, 373 SW2d 460, 463 (1963). The corrobative evidence may be direct evidence, circumstantial evidence or a combination thereof. It need not be adequate in and of itself to support a conviction. It is sufficient if the corrobative evidence fairly and legitimately tends to connect the defendant with the crime. *Sherrill v. State,* 204 Tenn. 427, 321 SW2d 811, 815 (1959).

In this case there was direct evidence of the deep animosity that the appellant harbored for the victim, since it was the victim who set in motion the various actions which resulted in his losing his esteemed position as a director and president of the bank, and his prosecution for banking irregularities. Mr. Blackwell of the TBI saw the appellant ride through the Hardeman Garment Company parking lot at the time he was to have an appointment with the accomplice. The appellant's own words were recorded and recognized by Mr. Blackwell. Any contention that these tapes are not independent corroboration of Gene Faglier's testimony totally ignores the testimony of Mr. Blackwell and another TBI agent, Jimmy Leech, who assisted in the taping. In accordance with the telephone conversation, Gene Faglier received $5,500.00 from Johnny Johnson, which was immediately delivered to Mr. Blackwell, as was the $1,000.00 down payment.

It is a question for the jury to determine whether an accomplice's testimony has been sufficiently corroborated. *Clapp v. State,* 94 Tenn. 186, 30 SW 214, 217 (1895). There was ample evidence from which the jury could find that the accomplice's testimony was fully corroborated. This issue has no merit.

In the next issue the appellant contends that the trial judge erred by allowing the victim to remain at the state's counsel table after testifying, as he was not the prosecutor.

As the state points out, the appellant has presented no authority for the contention that this amounted to reversible error. This issue was waived. Rule 27(a)(7), T.R.A.P.

In the next issue the appellant contends that the trial judge erred by not requiring the District Attorney General to stipulate the testimony of Dr. Thomas C. Wood. He contended that the failure to stipulate resulted in the eliciting of sympathy, passion and undue prejudice on the part of the jury. As the appellant points out in his own brief, the government is not generally required to stipulate evidence. *United States v. James,* 609 F.2d 36, 50 (2d Cir. 1979). The question as to whether the prosecutor should be required to stipulate evidence is a matter which rests within the sound discretion of the trial court. *United States v. Brinklow,* 560 F.2d 1003, 1006 (10th Cir. 1977). The prosecution was entitled to present its proof of the severity of the victim's injuries and was not required to stipulate. The trial judge did not abuse his discretion by refusing to require a stipulation.

In the next issue the appellant challenges the sufficiency of the evidence of making a threat for the purpose of obtaining action, since the record is devoid of any threat whatsoever.

It is not necessary for the precise nature of the threat to be conveyed, it is sufficient if the intention is conveyed to the victim. *State v. Needham,* 147 Tenn. 50, 245 SW 527, 529 (1922). In this case the proof revealed that the appellant wanted a "message" delivered to Mr. Weaver. The intended message to Mr. Weaver to tend to his own business and to leave the appellant's business alone, would, standing alone, hardly be considered a threat. However, when coupled with the massive physical injuries inflicted upon the victim, it is clear that the intention of the words was sufficiently conveyed to Mr. Weaver. This was clearly a threat, and this issue has no merit.

In the next issue the appellant contends that for the offense of conspiracy to commit an indictable offense, the venue in Henry Court was not established.

Venue need only be proven by a preponderance of the evidence. *Hooper v. State,* 205 Tenn. 246, 326 SW2d 448, 451 (1959). Venue may be proven by inference, if the inference is a

reasonable deduction from proven facts. Slight evidence is sufficient to carry the burden of proof of venue if the issue is uncontroverted. *State v. Bennett,* 549 SW2d 949, 950-951 (Tenn. 1977). In crimes of a continuing nature the legislature has the power to place venue in any county in which an element of the offense occurred. *State v. Matthews,* 87 Tenn. 689, 11 SW 793 (1889). The legislature has provided that where one or more elements of an offense are committed in one county and one or more elements in another, the offense may be prosecuted in either. Rule 18(b), T.R.Cr.P. These rules are "laws" of the State of Tennessee. *Tennessee Department of Human Services v. Vaughn,* 595 SW2d 62, 63 (Tenn. 1980).

The beating of Mr. Weaver occurred in Henry County. One of the elements of accessory before the fact of aggravated assault is the assault with the resulting bodily injury or serious bodily injury. TCA §39-2-101. While most of the conversations between Gene Faglier and the appellant occurred in Hardeman County, the overt act required for most conspiracies under TCA §39-1-602 occurred in Henry County. The acts of co-conspirators are the acts of all and are evidence against all. *Wiseman v. State,* 643 SW2d 354, 373 (Tenn.Cr.App. 1982). Venue was properly laid in Henry County, and this issue is without merit.

Next, the appellant contends that the trial judge erred by refusing to grant immunity to Hal Vest to testify on behalf of the appellant after the District Attorney General had granted Gene Faglier immunity to testify for the prosecution.

Immunity statutes are ordinarily for the benefit of the prosecution and may not be invoked by an accused to compel testimony of desired witnesses. *State v. Perry,* 246 Iowa 861, 69 NW2d 412, 419 (1964). There is no constitutional right to have immunity conferred upon defense witnesses. *United States v. Allstate Mortgage Corp.,* 507 F.2d 492, 495 (7th Cir. 1974). This issue has no merit.

Next, the appellant contends that the trial judge erred in not allowing the answers to proposed questions by the appellant's attorneys to the accomplice, Mr. Vest, to be read into the record. The witness, Mr. Vest, not having testified, it was proper for the trial judge to exclude the reading of his answers from a proposed stipulation. The questions with the answers appear in the record, but there is nothing to indicate that they were even under oath. The trial judge did not err in allowing this "evidence" to be introduced. This issue has no merit.

In the next issue the appellant contends that the trial judge erred in allowing Mr. Vest to invoke the Fifth Amendment prior to the questions being put to him.

Mr. Vest was entitled to invoke the Fifth Amendment. There is simply nothing that the appellant, the prosecutor, nor the judge could do to prevent Mr. Vest from simply refusing to answer any questions at all. Where there is a conflict between a defendant's right to compulsory process and a witness' right against self-incrimination, the right against self-incrimination is the stronger and paramount right. *State v. Dicks,* 615 SW2d 126, 129 (Tenn. 1981). This issue is without merit.

The appellant next contends that the trial judge erred by refusing to allow the appellant to invoke the Fifth Amendment as to the March 1982 incident for which he was under indictment in the Circuit Court of Hardeman County. The appellant offered to testify about the offenses for which he was on trial.

During a jury-out hearing the appellant sought to prohibit any cross-examination of him about the tape recorded conversations which had been previously admitted and played to the jury. The trial court ruled that if the appellant took the stand he would be required to answer all relevant questions on cross-examination, and this would include questions concerning the tapes.

When a defendant takes the stand to testify in his own behalf, he cannot then claim the privilege against cross-examination on

matters reasonably related to the subject matter of his direct examination. *McGautha v. California,* 402 U.S. 216, 91 S.Ct. 1454, 1471, 28 L.Ed.2d 711 (1971). When a defendant takes the stand to testify in his own behalf, he is subject to cross-examination as is any other witness. *Brown v. United States,* 356 U.S. 148, 78 S.Ct. 622, 627, 2 L.Ed.2d 589 (1958). Unless prosecutors are allowed wide leeway in the scope of impeachment cross-examination, the testifying defendant would be able to frustrate the truthseeking function of the trial by presenting tailored defenses insulated from effective challenge. *Doyle v. Ohio,* 426 U.S. 610, 617, n.7, 96 S.Ct. 2240, 2244, 49 L.Ed.2d 91 (1976). Once the defendant takes the stand, he must answer all relevant and proper questions asked of him. He is not permitted to tell what is favorable and then hide behind the privilege against self-incrimination to prevent the jury from hearing the unfavorable. By taking the stand he has waived the right to prevent the jury from hearing the unfavorable. *Neely v. State,* 86 Wis.2d 304, 292 NW2d 381, 391 (1978). To allow the testifying defendant to pick and choose the questions which he will answer would make the Fifth Amendment privilege "a positive invitation to mutilate the truth". *Brown v. United States, supra.* This issue has no merit.

In the final two issues the appellant challenges the sufficiency of the convicting evidence.

A jury verdict of guilty, approved by the trial judge, accredits the testimony of the state's witnesses and resolves all conflicts in favor of the theory of the state. *State v. Hatchett,* 560 SW2d 627, 630 (Tenn. 1978). On appeal the state is entitled to the strongest legitimate view of the evidence and all reasonable and legitimate inferences which may be drawn therefrom. *State v. Cabbage,* 571 SW2d 832, 835 (Tenn. 1978).

From the recitation of the facts throughout this opinion, it is clear that any rational trier of fact would be justified in finding the appellant guilty of all of the charged offenses beyond a

reasonable doubt. Rule 13(e), T.R.A.P., *Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781, 2786-2792, 61 L.Ed.2d 560 (1979). These issues are without merit.

Finding no merit to any of the issues, the judgment is affirmed.

JERRY SCOTT, JUDGE

CONCUR:

ROBERT K. DWYER, JUDGE

CHARLES H. O'BRIEN, JUDGE

IN THE COURT OF CRIMINAL APPEALS
OF TENNESSEE
JACKSON, APRIL SESSION, 1983

No. 4

HENRY CRIMINAL

State of Tennessee,
Appellee,

v.

Paul Nelms,
Appellant,

CONCURRING AND DISSENTING OPINION

I agree in principle with the general concept of the lead opinion. There are two issues raised by the defendant upon which it is apparent that the majority have gone astray.

The first has to do with the tape recordings of telephone conversations between the defendant and Gene Faglier relating to activities which took place elsewhere, more than a year after the events for which defendant was on trial in this case, and were subject of other prosecutions.

The State fought vigorously for the admission of the tape recordings, which was allowed by the court, insisting that the tapes contained evidence of other crimes and were admissible and relevant to show intent; hostility; settled purpose to harm or injure the victim in this case; motive; absence of accident or mistake; and a common scheme or plan on behalf of the defendant to work injury on the victim. In argument State's counsel also spoke of introduing the evidence to show a larger continuing plan or conspiracy, and the modus operandi.

Defendant, said it was error to allow their admission because they were not relevant; the recordings were made more than a

year after the offenses for which defendant was indicted in this case; they made absolutely no mention of the offenses for which defendant was on trial; they were not relevant as admissions of conduct to obstruct justice or avoid punishment; to prove intent, motive, absence of mistake or accident, or to prove any common scheme. It was also insisted that any probative value the tapes may have contained was substantially outweighed by unfair prejudice under the authority of Rule 403 of the Federal Rules of Evidence which has been adopted by the Courts of this State.

The two tapes in question were of conversations between defendant and Gene Faglier. The first of these is a dialogue between the two in which the defendant purportedly offered the sum of Six Thousand Five Hundred Dollars ($6,500) for Faglier to arrange the homicide of Jack Weaver, with a One Thousand Dollar ($1,000) down payment and the balance due upon completion of the act. The second tape was of a conversation by telephone between Faglier, from his home, and Nelms, who was in Hot Springs, Arkansas, informing him that the homicide had been accomplished and requesting payment of the balance of the agreed price. The tapes were made by the Tennessee Bureau of Investigation agents who were monitoring the conversations. The first tape was made while defendant and Faglier were standing on the street. It is practically worthless because of street noise and interference. The second is a clear and audible transmission in which defendant's voice was identified by TBI agent Blackwell who was monitoring the call. The tapes were transcribed. The transcriptions were not not made a part of this record, ostensibly, because they were not accepted as correct transcriptions. It is undisputed that neither of the tape recordings made any reference to the offenses for which defendant was on trial and related wholly and completely to plans for the assassination of Jack Weaver for a sum of money to be paid by Paul Nelms.[1]

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[1] It is a matter of record that defendant was acquitted of solicition to commit murder in Case No. 4516 in the Circuit Court of Hardeman County on April 19, 1983.

Analysis of this record makes it clear that the insistence upon by the State and the resistance to by defendant of the admission of the tapes was incidental to the real issue involved which was the admission of evidence of other crimes. It is difficult to conceive of anything more prejudicial in a case of this nature than to admit evidence of a subsequent solicitation to commit homicide on the same victim. There is no possible way the probative value could have exceeded the prejudicial aspect of the evidence. If it was not for other similar evidence in the record, which is far more damaging, there would be no doubt that prejudicial error occurred. However, prior to the admission of the tapes into evidence, Gene Faglier, Jack Blackwell, and Jimmy Leach, all were allowed to testify, without objection, about the procedure utilized in making the tapes, the entire text of the conversations between Gene Faglier and Paul Nelms and his business partner Johnny Johnson, detailing with much clarity and depth all of the incriminating evidence which the tapes contained. In the light of this the admission of the tape recordings was harmlessly redundant.

The majority opinion recites the litany on the admissibility of evidence of other crimes to show (1) motive, (2) intent, (3) guilty knowledge, (4) identity of the defendant, (5) absence of mistake or accident, or (6) a common scheme or plan for the commission of two or more crimes so related to each other the proof of one tends to establish the principle that the evidence of the latter events were relevant and admissible to show the defendant's intent in this case and his motive. The majority make no attempt to explain how admission of evidence of an incident which did not occur until more than one year after the offense for which the defendant was on trial could be relevant except to say the evidence revealed that the assault was a part of a larger plan or conspiracy directed against the victim. This is the exact objection. Defendant was not on trial for the charges which were subsequently dismissed against him in Hardeman County, therefore there was no rhyme or reason for the admission of the evidence. The opinion goes on to say, "the most salient reason

for the admission of this evidence is upon the issue of identity." But, the identity of the defendant was never in question and the State has yet to raise the issue of identity as a reason for the admissibility of this evidence.

The error in the admission of this evidence is compounded by the more serious error resulting from the trial court's denial of the right of the defendant to invoke the Fifth Amendment to questions involving the offense for which he was under indictment in Hardeman County. All of the counts in the indictment in this case related to an attack on the victim, Jack Weaver, purportedly instigated or solicited by the defendant. This assault occurred in Henry County and the indictment against defendant was returned in that jurisdiction although he resided in Hardeman County and according to the evidence the solicitation or conspiracy was initiated there. More than a year later defendant was indicted in Hardeman County for the offense of solicitation of first degree murder. This is the offense referred to in the testimony of Gene Faglier, Blackwell and Leach, and in the tape recordings admitted into evidence in this case. In a pretrial motion hearing defense counsel informed the court that Mr. Nelms would like to take the stand and deny his guilt. It was requested that any cross-examination be limited to the facts of the offense for which he was on trial. The trial court ruled that he had declared the tapes admissible in evidence and defendant could be cross-examined about matters relating to the Hardeman County Indictment. At the close of the State's proof defense counsel specifically informed the court that if defendant took the stand and State's counsel asked about occurrences relating to the Hardeman County Indictment they would advise him to invoke the Fifth Amendment. They stated to the court that he would answer anything about the incidents for which he was on trial but they would not allow him to testify about the later indictment offense. The court responded, "I would require him to answer all questions that would be relevant to cross-examination, which would include questions concerning the tapes." The evidence relating to the subsequent offense for

which defendant was indicted in Hardeman County was not necessary in any way to show any of the elements which fall within the exception to the rule on admission of evidence of other crimes. The inhibition against the invocation of defendant's Fifth Amendment privilege against compulsory self-incrimination was an improper denial of his right.

> " . . . [T]he power to compel testimony is not absolute. There are a number of exemptions from the testimonial duty, the most important of which is the Fifth Amendment privilege against compulsory self-incrimination. The privilege reflects a complex of our fundamental values and aspirations, and marks an important advance in the development of our liberty. It can be asserted in any proceeding, civil or criminal, administrative or judicial, investigatory or adjudicatory; and it protects against any disclosures which the witness reasonably believes could be used in a criminal prosecution or could lead to other evidence that might be so used. This Court has been zealous to safeguard the values which underlie the privilege. *Kastigor v. United States;* 406 U.S. 441, 92 S.Ct. 1653, 1656, 32 L.Ed.2d 212 (1972)."

The privilege [against self-incrimination] can be claimed in *any proceding,* be it criminal or civil, administrative or judicial, investigatory or adjudicatory. * * * It protects *any disclosure* which the witness may reasonable apprehend *could be used in a prosecution or which could lead to other evidence that might be so used. In Re Gault,* 387 U.S. 1, 87 S.Ct. 1428, 1454, 18 L.Ed.2d 527 (1967). Also see *Malloy v. Hogan,* 378 U.S. 1, 84 S.Ct. 1489, 12 L.Ed.2d 653 (1964); *Jiminez v. State,* 582 S.W.2d 91, (Tenn.Cr.App.1979); *Long v. State,* 607 S.W.2d 482, (Tenn.Cr.App.1980).

The contradictory position taken in the lead opinion relative to the invocation of the right against self-incrimination illuminates an elementary error in reasoning. It is insisted that

the right to invoke the Fifth Amendment by witness Hal Vest was paramount and there was nothing the trial court could do to prevent him from refusing to answer any question at all. In the next breath the majority takes a completely opposite stand and vociferate that the defendant has no Fifth Amendment right to the same privilege.

In *Malloy, supra,* the United States Supreme Court quotes from *Boyd v. United States,* 116 U.S. 616, 631, 6 S.Ct. 524, 533, n.7, 29 L.Ed. 746 (1886) on the issue:

> " . . . any compulsory discovery by extorting the party's oath . . . to convict him of crime . . . is contrary to the principles of a free government. it is abhorrent to the instincts of an Englishman; it is abhorrent to the instincts of an American. It may suit the purposes of despotic power, but it cannot abide the pure atmosphere of political liberty and personal freedom."

In *Malloy* a defendant was jailed for contempt for invoking the Fifth Amendment as a witness at a Crime Commission Hearing, under the apprehension *of future prosecution.* The court, citing from *Hoffman v. United States,* 341 U.S. 479, 71 S.Ct. 814, 95 L.Ed. 1118, elaborated on the issue in these words:

> "The privilege afforded not only extends to answers that would in themselves support a conviction * * * but likewise embraces those which would furnish a link in the chain of evidence needed to prosecute. * * * [I]f the witness, upon interposing his claim, were required to prove the hazard * * * he would be compelled to surrender the very protection which the privilege is designed to guarantee. To sustain the privilege, it need only be evident from the implications of the question, in the setting in which it is asked, that a responsive answer to the question or an explanation of why it cannot be answered might be dangerous because injurious disclosure could result." 341 U.S., at 486-487, 71 S.Ct. at 818.

> [The judge must be] "*perfectly clear,* from a careful consideration of all the circumstances in the case, that the witness is mistaken, and that the answer[s] *cannot possibly* have such tendency" to incriminate. 341 U.S., at 488, 71 S.Ct., at 819.

Had the evidence insisted on by the State in this case been evidence of a past crime a different view could be taken. In such a case the defendant has been convicted, his guilt has been determined, his sentence imposed; the risk of violating his privilege against self-incrimination no longer exists.

This was an extremely close case on the evidence. Other than the evidence which was improperly admitted, there was no positive proof that defendant engaged in any of the activities for which he was convicted beyond the testimony of the accomplice, Gene Faglier. The jury had to make the inference on the evidence that defendant was guilty in order to return the verdict which they did. The trial error in denying defendant the privilege to take the stand and testify in his own behalf under the penalty of the loss of his constitutional right against self-incrimination, coupled with the other shortcomings to be found in this record, compels me to hold that the judgment of the trial court should be reversed and the case remanded for a new trial.

CHARLES H. O'BRIEN, JUDGE

APPENDIX B

IN THE SUPREME COURT OF TENNESSEE
AT JACKSON

Henry Criminal
C.C.A. No. 4

State of Tennessee,
Plaintiff-Appellee,

v.

Paul Nelms,
Defendant-Appellant.

ORDER

Upon consideration of the application for permission to appeal filed by the appellant and the answer of the appellee, the briefs of counsel and the entire record, the Court is of the opinion that the application should be and the same is hereby denied. We concur in the decision of the Court of Criminal Appeals in result only.

Costs will be borne by the appellant.

PER CURIAM

APPENDIX C

SUPREME COURT OF THE UNITED STATES

No. A-58

Paul Nelms,
Petitioner,

v.

Tennessee

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for petitioner(s),

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including September 2, 1984.

/s/ Sandra D. O'Connor
Associate Justice of the
Supreme Court of the
United States

Dated this 31st
day of July, 1984

APPENDIX D

QUESTIONS

1. Would you state your full name please.

A. Hal W. Vest, Sr.

2. Would you state your age and date of birth.

A.

3. Would you state your present address.

A.

4. What was your address in January, 1981?

A.

5. Do you know Harvey L. Faglier?

A. Yes

6. Do you know Gene Faglier?

A. Yes, I know him but I do not know him personally.

7. Mr. Vest, you and Harvey Faglier are charged in the Henry County Circuit Court with the beating of Jack Weaver?

A. Yes

8. Do you know Paul E. Nelms?

A. No

9. Have you ever met Paul E. Nelms?

A. No

10. Have you ever received any money from Paul E. Nelms?

A. No

11. Have you ever been hired by Paul E. Nelms to do anything?

A. No

12. Have you ever talked or had any conversation with Paul E. Nelms?

A. No

13. Has Gene Faglier ever hired you to do anything for Paul E. Nelms?

A. No

14. Has Harvey Faglier ever hired you to do anything for Paul E. Nelms?

A. No

15. Assuming the beating of Jack Weaver occurred as the State of Tennessee alleges in January, 1981, to your knowledge did Paul Nelms know about it or have anything to do with it?

A. No

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FILED
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ALEXANDER L. STEVAS
CLERK

(2)

No. 84-459

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

PAUL E. NELMS,
Petitioner,

vs.

STATE OF TENNESSEE,
Respondent.

On Petition for a Writ of Certiorari
to the Court of Criminal Appeals of Tennessee

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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3 P

QUESTIONS PRESENTED

1. Did the petitioner have the right to testify in his own defense and while so testifying to invoke the Fifth Amendment as to other criminal charges for which he was under indictment and which occurred fourteen months after the alleged crime for which the petitioner was on trial?

2. Did the petitioner have the right to have the court grant immunity to the defense witness, Hal Vest, who was one of two eyewitnesses and whose testimony would have exonerated the petitioner when the State of Tennessee granted an accomplice immunity to testify against the petitioner?

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No. 84-459

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

PAUL E. NELMS,
Petitioner,

vs.

STATE OF TENNESSEE,
Respondent.

On Petition for a Writ of Certiorari
to the Court of Criminal Appeals of Tennessee

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

The respondent respectfully submits that the petition for a writ of certiorari filed in this cause should be denied.

OPINIONS BELOW

The unpublished opinions of the Court of Criminal Appeals of Tennessee and the Supreme Court of Tennessee appear in the appendix to the petition for a writ of certiorari to this Court.

JURISDICTION

Jurisdiction in this Court is invoked pursuant to 28 U.S.C. §1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

Amendment 5

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment by a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice be put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself; nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment 6

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district where the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

Amendment 14, Section 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

On March 17, 1982, the grand jury of Henry County, Tennessee, indicted the petitioner on five (5) counts involving an assault upon Jack Weaver on January 22, 1981, to-wit:

Count I - Assault with intent to commit murder in the first degree;

Count II - Armed robbery;

Count III - Accessory before the fact of assault with intent to commit murder in the first degree;

Count IV - Making a threat for the purpose of obtaining action; and

Count V - Conspiracy.

On May 3, 1982, the grand jury of Hardeman County, Tennessee, indicted the petitioner for conspiracy and solicitation to commit the murder of Jack Weaver.

The Henry County indictment alleged the petitioner's involvement in a January 22, 1981, assault of Jack Weaver. The Hardeman County indictment alleged the petitioner's involvement in a March, 1982, crime against Jack Weaver. The January, 1981, crime and the March, 1982, alleged crime occurred approximately fourteen (14) months apart.

The petitioner was tried by a jury in Henry County on July 19-20, 1982, upon his plea of not guilty. Upon the conclusion of the presentation of evidence by the State the trial judge dismissed Counts I and II of the indictment. The petitioner was convicted of Count IV and lesser included offenses of Counts III and V as follows:

Count III - Accessory before the fact of aggravated assault and punishment fixed at not less than three (3) nor more than ten (10) years in State penitentiary;

Count IV - Making a threat for the purpose of obtaining action and punishment fixed at not less than two (2) nor more than five (5) years in State penitentiary; and

Count V - Conspiracy to commit an indictable offense and punishment fixed at eleven (11) months and twenty-nine (29) days in the Henry County jail and a fine of $1,000.00.

A summary of the evidence adduced at the petitioner's trial is contained in the opinion of the Court of Criminal Appeals, which opinion appears as Appendix A of the petition for writ of certiorari.

At trial, the State introduced as evidence two tape-recorded conversations in which the petitioner authorized the obtaining of a hit man to "eliminate" Weaver. At a jury-out hearing, the petitioner sought to prohibit any cross-examination of him about the tape-recorded conversations. The trial court responded that the tapes had been admitted and, therefore, cross-examination on those conversations would be proper. The court ruled that if the petitioner took the stand he would be required to answer all questions that would be "relevant to cross-examination, which would include questions concerning the tapes."

During the course of the trial, the petitioner's attorneys asked the court to grant immunity to Hal Vest, one of two persons present when Weaver was assaulted in January, 1981, so that Hal Vest could testify for the petitioner. The trial court denied the petitioner's motion. The State had granted Gene Faglier immunity to testify for the prosecution.

The petitioner appealed his Henry County conviction to the Court of Criminal Appeals, which affirmed the trial court's judgment on January 26, 1984. The Supreme Court of Tennessee denied the petitioner's application for permission to appeal on June 4, 1984.

REASONS FOR DENYING THE WRIT

Respondent respectfully submits that the instant petition should be denied since the judgment of the Court of Criminal Appeals of Tennessee does not involve any federal question of substance not heretofore determined by this Court or not decided in accord with applicable decisions of this Court. See Supreme Court Rule 17.1(c).

A.

In his first question presented to this Court, the petitioner contends that he had a right to invoke the Fifth Amendment as to the tapes implicating him in the March, 1982, incident for which he was under indictment in Hardeman County.

It is well-established that a defendant who takes the stand in his own behalf cannot then claim the privilege against cross-examination on matters reasonably related to the subject matter of his direct examination. *McGautha v. California,* 402 U.S. 183, 215 (1971). The privilege against self-incrimination does not shield him from proper questioning. *United States v. Havens,* 446 U.S. 620, 626-627 (1980); *Brown v. United States,* 356 U.S. 148, 154-155 (1958). As this Court noted in *Jenkins v. Anderson,* 447 U.S. 231 (1980),

> [a] defendant may decide not to take the witness stand because of the risk of cross-examination. But this is a choice of litigation tactics. Once a defendant decides to testify, "[t]he interests of the other party and regard for the function of courts of justice to ascertain the truth become relevant, and prevail in the balance of considerations determining the scope and limits of the privilege against self-incrimination." *Brown v. United States,* 356 U.S. 148, 156, 78 S.Ct. 622, 627, 2 L.Ed.2d 589 (1958).

447 U.S. at 238.

In the instant case, the petitioner never formally invoked the Fifth Amendment privilege against self-incrimination since he did not take the stand and testify in his own behalf. The privilege against self-incrimination may not be asserted in advance of questions actually propounded. *United States v. Harmon,* 339 F.2d 354, 359 (6th Cir. 1964), *cert. denied* 380 U.S. 944 (1965), *rehear. denied* 380 U.S. 989; *United States v. Roundtree,* 420 F.2d 845, 852 (5th Cir. 1969); *United States v. Held,* 435 F.2d 1361, 1366 (6th Cir. 1970); *United States v. Bell,* 448 F.2d 40, 42 (9th Cir. 1971). The privilege is merely an option of refusal, not a prohibition of inquiry. 8 Wigmore, Evidence § 2268 (3d ed. 1961); 98 C.J.S. Witnesses § 436. Thus, the petitioner's claim of the Fifth Amendment privilege was premature and not properly invoked in this case. The advance ruling of the trial court that he would require the petitioner "to answer all questions that would be relevant to cross-examination" conveyed a correct statement of the law to the petitioner. *See McGautha v. California, supra.* The petitioner weighed the risk of cross-examination and chose not to testify, precluding any claim of the privilege. The petitioner's allegation on this issue does not merit the granting of certiorari.

B.

In the second question presented for review, the petitioner contends that he had a right to have the trial court grant immunity to the defense witness, Hal Vest.

Immunity statutes are ordinarily for the benefit of the prosecution and may not be invoked by the accused to compel the testimony of desired witnesses. *See, e.g., State v. Perry,* 246 Iowa 861, 69 N.W.2d 412, 419 (1964). There is no constitutional right to have immunity conferred on defense witnesses. *United States v. Allstate Mortgage Corp.,* 507 F.2d 492, 495 (7th Cir. 1974), *cert. denied* 421 U.S. 999; *United States v. Trejo-Zambrano,* 582 F.2d 460, 464 (9th Cir. 1978), *cert. denied* 439 U.S. 1005; *Autry v. Estelle,* 684 F.2d 1126, 1130 (5th Cir.

1983); *United States v. Fricke,* 684 F.2d 1126, 1130 (5th Cir. 1982), *cert. denied* ____ U.S. ____, 103 S.Ct. 1250, *rehear. denied,* ____ U.S. ____, 103 S.Ct. 1805.

The petitioner asks this Court to adopt the view of the United States Court of Appeals for the Third Circuit imposed in federal prosecutions in *United States v. Morrison,* 535 F.2d 223 (3d Cir. 1976); *Herman v. United States,* 589 F.2d 1191 (3d Cir. 1978); *Government of Virgin Islands v. Smith,* 615 F.2d 964 (3d Cir. 1980), which essentially holds that where a witness has essential exculpatory evidence, a defendant is entitled to the witness's testimony by judicially conferred immunity unless outweighed by strong government interests. However, even if this holding were made applicable here, the petitioner had no right to have immunity granted to Hal Vest. The record fails to show that the prosecution's decision (not to grant immunity to Vest) was made with "the deliberate intention of distorting the judicial fact finding process", *United States v. Herman, supra,* 589 F.2d at 1204, rather than legitimate, bona fide prosecutorial interests, or that Vest possessed essential exculpatory evidence. The petitioner's allegation on this issue does not merit the granting of certiorari.

CONCLUSION

For the reasons stated herein, the respondent respectfully submits that, in affirming the petitioner's conviction, the Court of Criminal Appeals of Tennessee did not decide a federal question of substance not heretofore determined by this Court nor did it decide any such question in a way probably not in accord with applicable decisions of this Court. There are no special or important reasons for granting certiorari in this cause, and accordingly, the instant petition should be denied.

Respectfully submitted,

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